

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 06**

ST ENGINEERING HACKNEY, INC.¹

Employer

and

RODNEY A. MYERS

Case 06-RD-279255

Petitioner

and

**UNITED STEEL, PAPER & FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
& SERVICE WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC**

Union

DECISION AND DIRECTION OF ELECTION

On June 29, 2021, Rodney A. Myers (the “Petitioner”) filed the petition under Section 9(c) of the National Labor Relations Act, as amended (the “Act”) seeking to decertify United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC (“the Union”)² as the exclusive collective-bargaining representative of the production, shipping and receiving, and Quality Control employees employed by ST Engineering Hackney, Inc. (the “Employer”) at its Montgomery, Pennsylvania facility.³ The parties stipulated, and I find, the petitioned-for unit to be appropriate for the purposes of collective bargaining. There are approximately 113 employees in the unit.

The sole issue presented in this proceeding is whether to conduct a manual election or mail-ballot election in light of the COVID-19 pandemic. A hearing officer of the National Labor Relations Board (the “Board”) held a videoconference hearing in this matter on July 22, 2021.⁴ Although the mechanics of an election is not a litigable issue, the parties were permitted to state their respective positions regarding the issue on the record and were afforded the opportunity to file post-hearing briefs. Only the Union submitted a post-hearing brief for my consideration. The Employer and Petitioner presented their respective positions on the record.

¹ The Employer’s and the Union’s names appear here as amended by the parties.

² The parties stipulated, and I find that the Union is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

³ The parties stipulated, and I find, that on March 13, 2020, in Case 06-RC-255567, the Union was certified as the exclusive collective-bargaining representative of the unit.

⁴ Hereinafter all dates occurred in 2021, unless otherwise noted.

As will be described in more detail below, the Employer and Petitioner argue that notwithstanding the ongoing COVID-19 pandemic, a manual election in this case is appropriate and can be conducted safely. The Employer proposes the use of its cafeteria for the election, a space that is 75 by 75 feet, with a separate entrance and exit at opposite ends of the cafeteria. The Union, on the other hand, contends that COVID-19 cases are trending upward, vaccination rates for COVID-19 are lagging, that the safest method to conduct the election is by mail-ballot, and that a mail-ballot election will maximize the number of employees who will vote in the election.

As explained below, due to the continued pandemic and the current local COVID-19 related data, along with applicable Board law, I find that a mail-ballot election is necessary. Accordingly, I will direct a mail-ballot election in this case, the details of which are described at the end of this Decision.

I. STATEMENT OF FACTS

The Employer is engaged in the manufacture and nonretail sale of insulated truck bodies and trailers. As part of its operations, the Employer maintains a facility in Montgomery, Pennsylvania, the only facility involved herein. The Employer's facility, where the Employer and Petitioner have proposed to conduct the manual election, is located in Lycoming County, Pennsylvania.

From July 27 to August 9, a 14-day period, the Lycoming County COVID-19 Case Dashboard shows that the daily increase of new COVID-19 cases, went up from 7 to 14 cases.⁵

14-day Lycoming County Daily Increase of new COVID-19 Cases													
-14	-13	-12	-11	-10	-9	-8	-7	-6	-5	-4	-3	-2	-1
7	11	8	6	NA ⁶	2	18	13	16	10	12	NA ⁷	20	14

The Pennsylvania Department of Health also shows an increase in COVID-19 cases in Lycoming County over the same period.⁸

As of August 6, the Lycoming County COVID-19 Data Dashboard shows that the 7-day testing positivity rate for COVID-19 in Lycoming County is currently 5.5 %.⁹ The Centers for Disease Control and Prevention ("CDC"), an agency of the federal government, reports that the current 7-day rolling positivity rate in Lycoming County, last reported on August 8, is 7.08%, a 4.03% increase from the prior 7-day period.¹⁰

II. BOARD LAW

The Board's longstanding policy is that elections should, as a rule, be conducted manually. See National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2; *San Diego Gas and Electric*, 325 NLRB 1143, 1145 (1998). However, the Board has stated that a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual

⁵ <https://lycoming-county-pa-covid-19-lyco.hub.arcgis.com/>.

⁶ The number of new Covid-19 cases for Saturday and Sunday is combined and reported on Sundays.

⁷ See fn. 6 above.

⁸ <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>. See Cases tab under "OpenData" information.

⁹ <https://lycoming-county-pa-covid-19-lyco.hub.arcgis.com/>. Lycoming County reports the COVID-19 positivity rate on a weekly basis.

¹⁰ <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>. See County View tab.

election problematic, to conduct an election by mail ballot. The Board has set forth three specific circumstances in which Regional Director's may exercise discretion to direct a mail-ballot election:

“(1) where eligible voters are “scattered” because of their job duties over a wide geographic area; (2) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lock-out, or picketing in progress. “ *San Diego Gas and Electric*, supra at 1145.

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *Id.*; *Halliburton Serv.*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958). The Board's discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas and Elec.*, 325 NLRB at 1144-1145. The Regional Director's decision should not be overturned unless a clear abuse of discretion is shown. *National Van Lines*, 120 NLRB at 1346.

During the COVID-19 pandemic, the risk of infection associated with gatherings and in-person activities has impacted the way the Board conducts its elections, leading to an increase in the number of elections conducted by mail. After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April 2020, with many Regional Directors directing primarily mail-ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in safely conducting elections, on July 6, 2020, the General Counsel issued a memorandum titled “Suggested Manual Election Protocols,” *Memorandum GC 20-10*, setting forth detailed suggested safety procedures.

Thereafter, in *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), the Board addressed how Regional Directors should assess the risks associated with the pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its longstanding policy favoring manual elections, but outlined six situations that suggest the propriety of mail ballot elections. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The Employer fails or refuses to commit to abide by *GC Memo 20-10*, Suggested Manual Election Protocols;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

The Board did not give increased weight to any particular factor and specifically found that only one factor need be present in order to “normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.” *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 4. With respect to COVID-19 data, the Board noted that “County-level positivity rate data should be obtained from official state or local government sources.” Id. at 6, fn. 25.

III. APPLICATION OF BOARD LAW TO THE FACTS

After careful examination of the record, the parties’ positions, and the current state of COVID-19 in Lycoming County where the Employer’s facility is located, I have determined that a mail-ballot election is the safest and most appropriate method for conducting this election under the second factor set forth in *Aspirus Keweenaw*.

The first *Aspirus Keweenaw* factor does not favor a mail ballot - the Regional Office is not currently in mandatory telework status. Regarding the third factor, I find no state, county, or local measure as to maximum gathering size would be implicated by a manual election. With respect to the fourth factor, the Employer’s commitments regarding precautions for a manual election are generally consistent with *GC Memo 20-10*, and as to the fifth factor, there is no basis to find a COVID-19 outbreak is ongoing at the Employer’s facility.¹¹

In addressing the second factor – whether the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or whether the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher – the Board directs Regional Directors to utilize the data published by Johns Hopkins University, or data from official state or local government sources. Where county level data are not available, Regional Directors should look to state level data.

The Lycoming County COVID-19 Case Dashboard shows that the 14-day trend of new COVID-19 cases has increased from 7 to 14 cases. Thus, the number of COVID-19 cases in Lycoming County is increasing. Although the Employer argues that the 14-day trend of COVID-19 cases is significantly lower in Lycoming County compared to all other counties in Pennsylvania, the applicable analysis is the 14-day trend in COVID-19 cases in the particular county where the Employer’s facility is located, and the Board did not express this standard as one that is measured as it is relative to other counties.

Moreover, according to the Lycoming County COVID-19 Data Dashboard as of August 6, the 7-day testing positivity rate in Lycoming County is 5.5 %. According to the CDC, the 7-day rolling positivity rate in Lycoming, as of August 8, is 7.08%, a 4.03% increase from the prior 7-day period. While the positivity rate does not appear to meet, the 14-day threshold set forth in *Aspirus*, the data shows that the positivity rate in Lycoming County is trending upward as well.

Accordingly, based on COVID-19 data, I find that factor two of the Board’s *Aspirus* test is met here, and a mail-ballot election is appropriate.

¹¹ There has been no COVID-19 outbreak at the Employer’s facility, and the last date that an employee tested COVID-19 positive was on May 17.

IV. FINDINGS AND CONCLUSIONS

Having carefully considered the record evidence and applying the applicable Board law to these circumstances, I find that a mail-ballot election is the safest and most appropriate method for conducting this election. I therefore direct a mail-ballot election in this case.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹²

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. There is no contractual bar, or any other bar, to conducting an election in this matter.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time production, maintenance, shipping and receiving, and Quality Control employees employed at the Employer's Montgomery, Pennsylvania, facility.

Excluded: All temporary employees, office clerical employees and guards, professional employees, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC.

¹² The parties stipulated that the Employer is a Delaware corporation, and is engaged in the manufacture and nonretail sale of insulated bodies and trailers from its Montgomery, Pennsylvania facility, the only facility involved herein. The parties further stipulated that the Employer, during the past 12-months, a representative period, shipped directly from its Montgomery, Pennsylvania, facility to points located outside the Commonwealth of Pennsylvania, goods and materials valued in excess of \$50,000.

A. Election Details

I have determined that a mail-ballot election will be held in light of the extraordinary circumstances presented by the ongoing pandemic and the increasing number of confirmed COVID-19 cases in Lycoming County, Pennsylvania.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at 5:00 p.m. on Friday, August 27, 2021, by the National Labor Relations Board, Region 06 from its office at 1000 Liberty Ave. Room 904 Pittsburgh, PA 15222-4111. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Friday, September 3, 2021, should communicate immediately with the National Labor Relations Board by either calling the Region 06 Office at (412) 395-4400 or our national toll free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be commingled and counted at the Region 06 Office on Friday, September 17, 2021, at 1:00 p.m. In order to be valid and counted, the returned ballots must be received in the Pittsburgh Regional Office prior to the counting of the ballots. Due to the extraordinary circumstances of Covid-19 and the directions of state or local authorities including but not limited to Stay at Home orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a videoconference platform (such as Zoom) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending Friday, August 6, 2021, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by Friday, August 13, 2021. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election that will issue and that accompany this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review in this case may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: August 11, 2021

/s/ Nancy Wilson

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